

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON,

Plaintiff,

v.

ALDERWOOD SURGICAL CENTER LLC,
et al.,

Defendants.

CASE NO. 2:22-cv-01835-RSM

**MODIFIED MODEL AGREEMENT
REGARDING DISCOVERY OF
ELECTRONICALLY STORED
INFORMATION AND ORDER**

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information (“ESI”) in this matter:

A. General Principles

1. An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI

1 and related responses should be reasonably targeted, clear, and as specific as possible. This
2 agreement is intended to assist the parties in identifying relevant, responsive information that has
3 been stored electronically and is proportional to the needs of the case. The agreement does not
4 supplant the parties' obligations to comply with Fed. R. Civ. P. 34.

5 **B. ESI Disclosures**

6 Within 30 days of entry of this Order, or at a later time if agreed to by the parties, each
7 party shall disclose:

8 1. Custodians. The custodians most likely to have discoverable ESI in their
9 possession, custody, or control. The custodians shall be identified by name, title,
10 connection to the instant litigation, and the type of the information under the
11 custodian's control.

12 2. Non-custodial Data Sources. A list of non-custodial data sources (*e.g.*, shared
13 drives, servers), if any, likely to contain discoverable ESI.

14 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to
15 contain discoverable ESI (*e.g.*, third-party email providers, mobile device providers, cloud
16 storage) and, for each such source, the extent to which a party is (or is not) able to preserve
17 information stored in the third-party data source.

18 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
19 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the
20 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).

21 5. Health Privacy Laws. The parties agree that the discovery, production, and use of
22 Private Health Information (PHI) in ESI shall comply with the PHI provisions in the Protective
23 Order as agreed by the parties and entered by the Court.

6. Foreign data privacy laws. Nothing in this Order is intended to prevent either party from complying with the requirements of a foreign country's data privacy laws, *e.g.*, the European Union's General Data Protection Regulation (GDPR) (EU) 2016/679. Defendants shall notify the State if responsive ESI is subject to a foreign privacy law and the parties will meet and confer in good faith to ensure compliance with said law prior to any production of such ESI.

C. ESI Discovery Procedures

1. On-site inspection of electronic media. Such an inspection shall not be required absent a demonstration by the requesting party of specific need and good cause or by agreement of the parties.

2. Search methodology. The parties shall timely confer to attempt to reach agreement on appropriate search terms and queries, file type and date restrictions, data sources (including custodians), and other appropriate computer- or technology-aided methodologies. The parties shall continue to cooperate in revising the appropriateness of the search methodology.

a. Prior to running searches:

i. The producing party shall disclose the data sources (including custodians), search terms and queries, any file type and date restrictions, and any other methodology that it proposes to use to locate ESI likely to contain responsive and discoverable information. The producing party may provide unique hit counts for each search query.

ii. After disclosure, the parties will engage in a timely meet and confer process regarding additional terms sought by the non-producing party.

iii. The following provisions apply to search terms / queries of the requesting party. Focused terms and queries should be employed; broad terms or queries, such as product and company names, generally should be avoided. A conjunctive combination of multiple

1 words or phrases (*e.g.*, “computer” and “system”) narrows the search and shall count as a single
2 search term. A disjunctive combination of multiple words or phrases (*e.g.*, “computer” or
3 “system”) broadens the search, and thus each word or phrase shall count as a separate search term
4 unless they are variants of the same word. The producing party may identify each search term or
5 query returning overbroad results demonstrating the overbroad results and a counter proposal
6 correcting the overbroad search or query.

7 b. Upon reasonable request, a party shall disclose information relating to
8 network design, the types of databases, database dictionaries, the access control list and security
9 access logs and rights of individuals to access the system and specific files and applications, the
10 ESI document retention policy, organizational chart for information systems personnel, or the
11 backup and systems recovery routines, including, but not limited to, tape rotation and
12 destruction/overwrite policy.

13 3. Format.

14 a. ESI will be produced to the requesting party with searchable text. Each
15 requesting party may specify in its requests for production the acceptable format for production
16 (*i.e.*, one compatible with its e-discovery platform). Acceptable formats include, but are not
17 limited to, native files, multi-page TIFFs (with a companion OCR or extracted text file), single-
18 page TIFFs (only with load files for e-discovery software that includes metadata fields identifying
19 natural document breaks and also includes companion OCR and/or extracted text files), and
20 searchable PDF. If a producing party’s e-discovery platform cannot process documents in the
21 requested format, then the producing party shall notify the requesting party as soon as feasible,
22 and the requesting party will coordinate with producing party on an alternative compatible format
23 with both parties’ platforms.

1 b. Unless otherwise agreed to by the parties, files that are not easily converted
2 to image format, such as spreadsheet, database, and drawing files, will be produced in native
3 format. Native files shall be produced with a link in the NATIVEPATH field, along with extracted
4 text (where extracted text is available) and applicable metadata fields set forth elsewhere herein.
5 For each native file produced, the production will include a TIFF image slipsheet indicating the
6 production number of the native file and stating, “File Provided Natively.”

7 c. Each document image file shall be named with a unique number (Bates
8 Number). File names should not be more than twenty characters long or contain spaces. When a
9 text-searchable image file is produced, the producing party must preserve the integrity of the
10 underlying ESI, *i.e.*, the original formatting, the metadata (as noted below) and, where applicable,
11 the revision history.

12 d. If a document is more than one page, the unitization of the document and
13 any attachments and/or affixed notes shall be maintained as they existed in the original document.

14 4. De-duplication. The parties may de-duplicate their ESI production across custodial
15 and non-custodial data sources after disclosure to the requesting party, and the duplicate custodian
16 information removed during the de-duplication process tracked in a duplicate/other custodian
17 field in the database load file.

18 5. Email Threading. The parties may use analytics technology to identify email
19 threads and need only produce the unique most inclusive copy and related family members and
20 may exclude lesser inclusive copies—unless a lesser inclusive copy includes attachments to an
21 email, in which case, it must be produced. Upon reasonable request, the producing party will
22 produce a less inclusive copy.

1 6. Metadata fields. If the requesting party seeks metadata, the parties agree that only
2 the following metadata fields need be produced, and only to the extent it is reasonably accessible
3 and non-privileged: document type; custodian and duplicate custodians (or storage location if no
4 custodian); author/from; recipient/to, cc and bcc; title/subject; email subject; file name; file size;
5 file extension; original file path; date and time created, sent, modified and/or received; and hash
6 value. The list of metadata type is intended to be flexible and may be changed by agreement of
7 the parties, particularly in light of advances and changes in technology, vendor, and
8 business practices.

9 7. Processing Specifications. When processing ESI for production as an electronic
10 image, if a native file originally had track changes, comments, or other collaborative change
11 features turned on, the TIFF file will display those changes in the converted image file; the
12 producing party shall set imaging settings to force off “Auto Date” and force on: hidden columns
13 or rows, hidden worksheets, speaker notes, track changes, and comments.

14 8. Parent-Child Relationships. For ESI only, Parent-child relationships (association
15 between an attachment and its parent document) shall be preserved. The attachment(s) shall be
16 produced adjacent to the parent document, in terms of Bates numbers, with the first attachment
17 being named with the next sequential number after the parent, and any additional attachment(s)
18 sequentially numbered after that first attachment.

19 9. Hard-Copy Documents. If the parties elect to produce hard-copy documents in an
20 electronic format, the production of hard-copy documents will include a cross-reference file that
21 indicates document breaks and sets forth the custodian or custodian/location associated with each
22 produced document. The following coding fields should be provided, if applicable: (1) beginning
23 Bates number, (2) ending Bates number, (3) page count, and (4) source location/custodian.

1 Hard-copy documents will be scanned using Optical Character Recognition technology and
2 searchable ASCII text files will be produced (or Unicode text format if the text is in a foreign
3 language), unless the producing party can show that the cost would outweigh the usefulness of
4 scanning (for example, when the condition of the paper is not conducive to scanning and will not
5 result in accurate or reasonably useable/searchable ESI). Each file will be named with a unique
6 Bates Number (*e.g.*, the unique Bates Number of the first page of the corresponding production
7 version of the document followed by its file extension).

8 **D. Preservation of ESI**

9 The parties acknowledge that they have a common law obligation, as expressed in
10 Fed. R. Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable
11 information in the party's possession, custody, or control. With respect to preservation of ESI,
12 the parties agree as follows:

13 1. Absent a showing of good cause by the requesting party, the parties shall not be
14 required to modify the procedures used by them in the ordinary course of business to back-up and
15 archive data; provided, however, that the parties shall preserve all discoverable ESI in their
16 possession, custody, or control.

17 2. The parties will supplement their disclosures in accordance with
18 Fed. R. Civ. P. 26(e) with discoverable ESI responsive to a particular discovery request or
19 mandatory disclosure where that data is created after a disclosure or response is made (unless
20 excluded under Sections (D)(3) or (E)(1)-(2)).

21 3. Absent a showing of good cause by the requesting party, the following categories
22 of ESI need not be preserved:

23 a. Deleted, slack, fragmented, or other data only accessible by forensics.

24 b. Random access memory (RAM), temporary files, or other ephemeral data

that are difficult to preserve without disabling the operating system.

- c. On-line access data such as temporary internet files, history, cache, cookies, and the like.
- d. Data in metadata fields that are frequently updated automatically, such as last-opened dates (see also Section (E)(5)).
- e. Back-up data that are duplicative of data that are more accessible elsewhere.
- f. Server, system or network logs.
- g. Data remaining from systems no longer in use that is unintelligible on the systems in use.
- h. Electronic data (*e.g.*, email, calendars, contact data, and notes) sent to or from mobile devices (*e.g.*, iPhone, iPad, Android devices), provided that a copy of all such electronic data is automatically saved in real time elsewhere (such as on a server, laptop, desktop computer, or “cloud” storage).

E. Privilege

1. A producing party shall create a privilege log of all documents fully withheld from production on the basis of a privilege or protection, unless otherwise agreed or excepted by this Agreement and Order. Privilege logs shall include a unique identification number for each document and the basis for the claim (attorney-client privileged or work-product protection). Whether the privilege log is generated using available metadata, such as for ESI, the privilege log should include at minimum fields identifying author/recipient or to/from/cc/bcc names; the subject matter or title; and date created. Should the available metadata provide insufficient information for the purpose of evaluating the privilege claim asserted, the producing party shall include such additional information as required by the Federal Rules of Civil Procedure. Privilege logs will be produced to all parties no later than sixty (60) days after the time for completing a production pursuant to Fed. R. Civ. P. 34(b)(2)(B) unless an earlier deadline is agreed to by the parties.

1 2. Redactions need not be logged so long as the basis for the redaction is clear on the
2 redacted document.

3 3. With respect to privileged or work-product information generated after each party
4 reasonably anticipated litigation, parties are not required to include any such information in
5 privilege logs. For purposes of this Agreement, the State has identified August 19, 2019 as the
6 date it reasonably anticipated litigation and the parties agree that Defendants reasonably
7 anticipated litigation as of October 7, 2021. Nothing in this Agreement or Order prevents
8 Defendants from disputing the date that the State reasonably anticipated litigation or prevents
9 either party from challenging the other party's claim to privilege or work-product information.

10 4. Activities undertaken in compliance with the duty to preserve information are
11 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

12 5. Pursuant to Fed. R. Evid. 502(d), the production of any documents, electronically
13 stored information (ESI) or information, whether inadvertent or otherwise, in this proceeding
14 shall not, for the purposes of this proceeding or any other federal or state proceeding, constitute
15 a waiver by the producing party of any privilege applicable to those documents, including the
16 attorney-client privilege, attorney work-product protection, or any other privilege or protection
17 recognized by law. This Order shall be interpreted to provide the maximum protection allowed
18 by Fed. R. Evid. 502(d). The provisions of Fed. R. Evid. 502(b) do not apply. Nothing contained
19 herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI
20 or information (including metadata) for relevance, responsiveness and/or segregation of
21 privileged and/or protected information before production. Information produced in discovery
22 that is protected as privileged or work product shall be immediately returned to the
23 producing party.

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

DATED: 6/21/2023

/s/ Zorba Leslie

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ORDER

Based on the foregoing, IT IS SO ORDERED.

DATED: June 23, 2023



RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE